No. 20-50654

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINDA JANN LEWIS, MADISON LEE, ELLEN SWEETS, BENNY ALEXANDER, GEORGE MORGAN, VOTO LATINO, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TEXAS ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs–Appellees,

v.

RUTH HUGHS,
Texas Secretary of State,

Defendant–Appellant.

On Appeal from the United States District Court
for the Western District of Texas
Civil Action No. 5:20-cv-00577

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**5th Cir. Admission Pending*

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2 have an interest in the outcome of this case. These

CERTIFICATE OF INTERESTED PERSONS (continued)

representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees

1. Linda Jann Lewis
2. Madison Lee
3. Ellen Sweets
4. Benny Alexander
5. George Morgan
6. Voto Latino: no parent corporation or stock.
7. Texas State Conference of the National Association for the Advancement of Colored People: no parent corporation or stock.
8. Texas Alliance for Retired Americans: no parent corporation or stock.

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Defendant-Appellant

Because Appellant and her attorneys are government entities, disclosure is unnecessary under the fourth sentence of Fifth Circuit Rule 28.2.1.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary to decide this appeal. There is no merit to the Secretary's appeal of the district court's order denying the motion to dismiss. The Secretary's sovereign immunity arguments fail under this Court's case law.

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INTRODUCTION

Appellees challenge the constitutionality of four Texas mail voting statutes or procedures that burden the right to vote of lawful Texas voters (together, the "Challenged Provisions"). Appellees sued the Texas Secretary of State (the "Secretary"), who is statutorily charged with enforcing and ensuring the uniform application of the Challenged Provisions. The Eleventh Amendment is no bar to Appellees' suit.

Under the longstanding *Ex parte Young* framework, private parties may bring suits for injunctive or declaratory relief—as Appellees do here—against state officials acting in violation of federal law, consistent with the Eleventh Amendment. The Secretary's contention that the *Ex parte Young* exception does not apply because she purportedly has no connection to the enforcement of the Challenged Provisions is contrary to her plain statutory authority and belied by her own actions undertaken consistent with that authority.

To determine whether *Ex parte Young* applies, this Court considers whether the defendant has a sufficient connection to the enforcement of the challenged law to authorize suit against them. *Ex parte Young*, 209 U.S. 123, 157 (1908). The Challenged Provisions at issue here are: (1) the wholesale rejection of all mail ballots that are not received by elections administrators by 5:00 p.m. the day after the election, even if they are postmarked on or before election day (the "Receipt Deadline"), Tex. Elec. Code § 86.007; (2) the rejection of mail ballots if untrained county officials

determine—based on no standard other than their entirely subjective best judgment, as instructed by the Secretary—that the voter's signature on the envelope does not match their signature on their vote-by-mail application, with no opportunity for a voter to cure a mistaken rejection ("Signature Matching Without Cure"), *id.* § 87.027; (3) the criminalization of third-party assistance to voters by anyone other than close relatives or household members in returning marked mail ballots in time to be counted (thereby effectively eliminating one way in which voters who lack access to safe and reliable transportation can ensure that their ballot arrives in time to be counted and is not rejected due to delayed mail because of the Receipt Deadline) (the "Ballot Return Assistance Ban"), *id.* § 86.006; and (4) the implicit requirement that all voters, including those whose only realistic opportunity to vote is by mail, must pay for postage to exercise that right and return their mail-in ballots (the "Postage Tax"), *id.* § 86.002.

The Secretary has a sufficient connection to the enforcement of each of the Challenged Provisions based on her statutory duty to ensure that they are uniformly applied, and her demonstrated willingness to exercise that duty. As this Court noted recently in *Texas Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) ("*TDP*"), although "[t]he precise scope of the requirement for a connection has not been defined," it has long been understood that the nexus need not be all-inclusive or overwhelming. A mere "'scintilla of enforcement by the relevant state

official with respect to the challenged law' will do." *Id.* (quoting *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019)). Far more than such a scintilla is present here. Among other things, the Secretary ensures that (a) ballots cast are only considered under the same receipt deadline and counted when she says they should be counted—county elections officials have no authority to count ballots received after the election-day receipt deadline, regardless of when they were mailed or are postmarked; (b) signatures are evaluated under the rubric laid out in her Signature Verification Committee Handbook; (c) counties use a form prescribed by the Secretary's office for verifying that only the voter herself has hand-delivered her mail ballot, if not sent via mail or common or contract carrier, and another form for elevating to the Attorney General complaints lodged with her alleging that a criminal violation of the Code has occurred, including the possession of signed ballots by mail by non-family or non-household members; and (d) counties are subject to the same minimum requirement as to what ballot postage they must provide (which is none for return of a mail ballot, despite her authority to require that counties pre-pay return postage for mail ballots).[1]

[1] That some counties voluntarily provide prepaid return postage says nothing about the *minimum* return postage required by the Secretary, which again is none. That is, the fact that some counties go above and beyond the floor set by the Secretary does not change the existence of that statewide minimum requirement.

In an attempt to avoid her own responsibility, the Secretary emphasizes that county officials play a role in the enforcement of the Challenged Provisions. True enough. The Secretary is not the *only* election official in Texas who administers and enforces Texas election law. But the *Ex parte Young* exception applies whenever a state official has *some* connection to the law's enforcement; it does not require that the state official be the *only* authority involved. Moreover, the Secretary largely sidesteps the undeniable authority that comes with her role as the state's *chief elections official*—county elections officials answer to her in the application of Texas election law, and she has affirmative powers to ensure that they uniformly implement the provisions in question. The fact that they (and many others, including the Attorney General and, each cycle, thousands of poll workers) assist the Secretary in enforcing the state's election laws does not somehow inoculate her from suit under *Ex parte Young*.

Such a standard would be absurd in any context, but it would be particularly so here, where the Secretary has not hesitated to exercise her undeniable authority to maintain uniformity under the Code—including during the pendency of this very appeal. Specifically, while this appeal was pending, the Secretary exercised her authority to instruct the Attorney General to seek to enjoin a local election official from undertaking an action with respect to mail voting that other counties were not taking, and which was contrary to the Secretary's interpretation

of the law. The Secretary cannot have it both ways. She cannot flex the muscle of her authority when it suits her and hide behind the shield of sovereign immunity when it does not.

The Secretary's contention that she has been wrongfully hauled into court and is entitled to the protections of sovereign immunity in this suit is flatly wrong. The district court's denial of the motion to dismiss should be affirmed.

ISSUE PRESENTED

Does the *Ex parte Young* exception to sovereign immunity apply in this lawsuit regarding the constitutionality of Challenged Provisions that the Texas Secretary of State statutorily must and previously has ensured are uniformly applied according to her interpretations of their proper application?

STATEMENT OF THE CASE

A. This case involves the constitutionality of the Challenged Provisions, which the Secretary bears the responsibility and power to enforce uniformly.

The underlying action challenges the constitutionality of four Texas election laws or procedures that constrain mail voting: (1) the Receipt Deadline, Tex. Elec. Code § 86.007; (2) Signature Match Without Cure, *id.* § 87.027; (3) the Ballot Return Assistance Ban, *id.* § 86.006; and (4) the Postage Tax, *id.* § 86.002. ROA.18, 55-56. In their Complaint, Appellees requested that the Challenged Provisions be declared

unconstitutional and enjoined, including through injunctive relief that the Secretary has the power to enforce. ROA.55-56. Consistent with decades of voting rights jurisprudence in Texas and this Circuit, Appellees named the Secretary as the defendant, in her official capacity, because she serves as Texas's chief elections official and has the power and the duty to uniformly enforce Texas election law.

B. The Secretary filed a motion to dismiss, then proceeded to engage in extensive merits-based discovery.

Shortly after the Complaint was filed, the Secretary filed a motion to dismiss in which she asserted that sovereign immunity barred the case against her. ROA.102-31. Appellees opposed that motion on June 19, 2020, ROA.137-66, and filed a motion for preliminary injunction on June 22, 2020. ROA.236-72.

The day after Appellees filed their preliminary injunction motion, the Secretary moved for an indefinite extension of her time to respond so that she could engage in discovery. ROA.619-28. Nowhere in her extension request did the Secretary suggest that discovery should be limited to jurisdictional issues while her motion to dismiss was pending. At the district court's request, ROA.643-44, the parties submitted a joint scheduling proposal, which similarly did not suggest that discovery should be limited. ROA.645-49. On July 8, the district court entered a

scheduling order that allowed the parties to engage in expedited yet unbounded discovery from July 8 through August 21. ROA.652-53.

The Secretary proceeded to engage in merits-based discovery in earnest. The morning after the district court entered its scheduling order, the Secretary's counsel sent Appellees a lengthy list of people they intended to depose. *See Lewis v. Hughs*, No. 20-50654, Doc. 00515542111, at 507 (July 9, 2020 Email from P. Sweeten to Pls. Counsel). The Secretary's counsel then sent hundreds of pages of interrogatories, requests for production, and later, requests for admission. *See id.* at 509 (July 10, 2020 Email from P. Sweeten to Pls. Counsel); *id.* at 660-980 (270 collective requests for production, 120 interrogatories, and 100 requests for admission). A week later, the Secretary's counsel took their first deposition. By July 28—when the district court denied the Secretary's motion to dismiss, ROA.656-89—her counsel had taken 10 of 18 noticed depositions.

The Secretary did not immediately appeal the district court's July 28 order denying her motion to dismiss on sovereign immunity grounds, as detailed in the following section. Instead, she continued with both offensive and defensive merits-based discovery for nearly two weeks before noticing her appeal of the order on the motion to dismiss. Between July 29 and August 7, when she filed her notice of appeal, ROA.690-91, the Secretary's counsel disclosed an expert report and deposed three additional witnesses. And she produced a lawyer from her office—

Genevieve Gill, a Staff Attorney in the Elections Division—for deposition on August 4. By August 7, the Secretary's counsel had deposed all but five of the 18 people they had noticed—one of whom was not available until a later date, and another who was too ill to be deposed. The Secretary's remaining three depositions were to be of Appellees' experts, and her counsel specifically requested that they not take place until after the later deadline for expert rebuttal reports.

In short, the Secretary fully and vigorously litigated this case on the merits by engaging in substantial outbound and inbound merits-based discovery both before and after the district court order rejecting the sovereign immunity defense she pursues through this appeal.

C. The district court denied the Secretary's motion to dismiss on sovereign immunity grounds.

In its July 28 order, the district court rejected the Secretary's argument that she does not have the requisite connection to the enforcement of the challenged restrictions to satisfy *Ex parte Young*. ROA.670. The district court ruled that the necessary connection "derives from Section 31.003, which states that the Secretary 'shall obtain and maintain uniformity in the application, operation, and interpretation of [the Election Code].'" ROA.670 (quoting Tex. Elec. Code § 31.003). As further support for the Secretary's connection to the Challenged Provisions, the district court pointed to "the Secretary's power under the Texas Election Code to 'take appropriate action to protect' voting rights

'from abuse by the authorities administering the state's electoral processes,' a power that includes 'order[ing] the person to correct the offending conduct.'" ROA.670-71 (quoting Tex. Elec. Code § 31.005(a)-(b)). The district court affirmatively rejected the Secretary's argument that local officials do not report to her and are not bound by her advice. ROA.670. Finally, the district court ruled that Plaintiffs satisfied the requirement under *Ex parte Young* that their requested relief be prospective, since they "allege that the challenged restrictions are ongoing violations of federal law." ROA 672. The district court thus neatly disposed of the Secretary's sovereign immunity argument, in line with numerous other district courts in similar election law cases on similar grounds. *See, e.g.*, Order on Motion to Dismiss at 6, *Gilby v. Hughs*, Case No. 19-CV-1063 (W.D. Tex. Aug. 11, 2020), ECF No. 107; *Texas Democratic Party v. Hughs*, No. SA-20-CV-08, 2020 WL 4218227, at *2 (W.D. Tex. July 22, 2020); *Miller v. Hughs*, No. 19-CV-1071, 2020 WL 4187911, at *4 (W.D. Tex. July 10, 2020).

A motions panel of this Court summarily affirmed the district court's order denying the motion to dismiss. *See Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (per curiam). The Secretary then petitioned for rehearing en banc of that summary affirmance, and this Court later denied the petition. *See* Order, *Lewis v. Hughs*, No. 20-50654 (5th Cir. Nov. 5, 2020) (per curiam). Before doing so, however, the Court withdrew its initial summary affirmance, and

then denied Appellees' motion for summary affirmance and to dismiss the appeal as frivolous. *See Lewis v. Hughs*, No. 20-50654, 2020 WL 6066178 (5th Cir. Oct. 2, 2020) (per curiam).

SUMMARY OF THE ARGUMENT

The Secretary is not immune from suit against the Challenged Provisions. As a threshold matter, she forfeited and waived any argument that she had by engaging in robust merits-based offensive and defensive discovery well after filing her motion to dismiss and before appealing the district court's denial of it. In doing so, she impermissibly got the best of both worlds, which this Court's precedent does not permit: she got to monitor how the merits of the case were progressing while calculating whether an appeal on sovereign immunity grounds might be an easier out. *See Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000). This Court should not sanction such gamesmanship.

Even if the Secretary did not waive her immunity argument, her appeal fails on the merits based on her clear statutory authority and demonstrated willingness to wield it, as evidenced by various directives, forms, and the signature verification handbook that she publishes. Under her authority at Tex. Elec. Code §§ 31.003-.004, she is required to "obtain and maintain uniformity" and "assist and advise" all election officials regarding the "application, operation, and interpretation" of the Election Code, which includes the Challenged Provisions. And where the

Secretary takes issue with how other election officials are exercising their responsibilities, she is empowered to "order the person to correct the offending conduct," including through legal action. Tex. Elec. Code § 31.005.

These statutory provisions give the Secretary a sufficient connection under *Ex parte Young* to the enforcement of the Challenged Provisions because, pursuant to them, she must and does "constrain" local election officials from applying interpretations of the Challenged Provisions that differ from her own, part and parcel with her "compulsion" to enforce the Code uniformly. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). The whole-text canon requires that the Challenged Provisions be considered through the lens of the Secretary's general duties and authority under Sections 31.003-.004.

As a result, it does not matter whether she *personally* distributes, collects, or processes mail ballots: it is sufficient that, under her general statutory authority, she *directs* local officials on the Challenged Provisions' interpretation and application, and thereby "effectively ensure[s]" that they are universally and uniformly enforced to Appellees' detriment. *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). Ultimately, the fact that county officials are responsible for implementing the final mile of the Challenged Provisions does not negate the Secretary's own connection to them. *TDP*, 978 F.3d at 179-80.

This Court's standing jurisprudence also bolsters the conclusion that the Secretary has a sufficient connection to the Challenged Provisions because the inquiries under Article III standing—which the district court ruled Appellees have, and the Secretary has not sought leave to appeal—and the "connection" inquiry of *Ex parte Young* are almost identical. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017).

Finally, the Secretary's argument that the relief sought here is impermissible or would be ineffective fails. The Secretary conflates her nondiscretionary statutory duties *to* act under Sections 31.003-.004 with her discretionary authority to decide *how* to act. *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 429 (5th Cir. 1997) (recognizing that Sections 31.003-.004 "requir[e] the Secretary to take action with respect to elections"). Because Appellees' requested relief only concerns the former, it is appropriate under *Ex parte Young*. The Secretary's closing argument—that the relief Appellees seek would be ineffective because it supposedly does not extend to local officials—is wrong as a matter of law and civil procedure. It is also outside the scope of this appeal as an improper and entirely premature attempt to challenge the district court's ruling that Appellees have standing.

This Court should affirm the district court's decision denying sovereign immunity.

STANDARD OF REVIEW

The Court reviews jurisdictional rulings on sovereign immunity de novo. *Austin*, 943 F.3d at 997. Because this appeal is taken from an order denying the Secretary's motion to dismiss, the Court takes the allegations in the Complaint as true. *See Verizon Md. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012) ("In assessing jurisdiction, the district court is to accept as true the allegations and facts set forth in the complaint.").

ARGUMENT

I. The Secretary waived her right to assert immunity by engaging in merits-based discovery before seeking appellate review.

If the Secretary wished to maintain a sovereign immunity claim, she should have challenged the district court's broad discovery order or—at the very least—immediately appealed its order denying the motion to dismiss at the time it was issued. Instead, the Secretary not only engaged in extensive merits-based discovery while her motion to dismiss was pending, she continued to do so for weeks *after* the district court issued its order rejecting her sovereign immunity argument, including by offering a staff attorney from her office as a witness at a deposition during that time frame.

This Court has found that an "unequivocal" waiver of immunity occurs where, as here, a defendant's conduct evidences "an intent to

defend the suit against it on the merits." *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000). In this way, defendants are prohibited from "hav[ing] the best of both worlds" by "monitor[ing] how the suit was proceeding on the merits but hav[ing] any adverse ruling set aside on Eleventh Amendment grounds." *Id. at* 279. That is precisely what the Secretary attempted to do here.[2]

Although the Secretary initially asserted an immunity defense in her motion to dismiss, she held back a full-throttle and "consistent[] assert[ion]" of it, and thus ultimately waived it. *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015). In particular, while her motion to dismiss was still pending she filed a motion for an extension of time to engage in broad discovery to mount a preliminary injunction defense, but that extension motion did not mention sovereign immunity and did not suggest that discovery should be limited to jurisdictional issues. ROA.619-28. And she submitted a scheduling proposal for that unlimited discovery—also while her motion to dismiss was still pending—that likewise did not mention sovereign immunity. ROA.645-49. Even after

[2] In prior filings the Secretary cited *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), to suggest that she cannot forfeit a sovereign immunity argument, but that argument is misplaced. *Edelman* only considered whether forfeiture was possible where a defendant did not raise the argument in the trial court at all. *Id.* Here, although the Secretary initially raised the argument, she actively undermined and effectively abandoned it through her litigation conduct. *Edelman* is thus inapposite.

the district court denied her motion to dismiss, she affirmatively used the district court's order permitting unbounded discovery to her advantage by impermissibly and extensively exploring the merits of the case before finally appealing the denial of her motion to dismiss on sovereign immunity grounds.

To have sincerely and "consistently asserted" her position, *Carroll*, 800 F.3d at 169, the Secretary should have appealed the district court's order permitting broad discovery—but she inexplicably did not.[3] Instead, the Secretary actively sought and facilitated broad, non-jurisdictional discovery *both before and after* resolution of her motion to dismiss. In doing so, she clearly "evidenced an intent to defend the suit against [her] on the merits." *Neinast*, 217 F.3d at 279. Her counsel deposed *thirteen* witnesses on merits-based topics between her June 3 assertion of immunity and the district court's July 28 ruling on the issue. None of those witnesses touched on the sovereign immunity question, and none were asked anything related to immunity. In that time frame, the Secretary also issued over 270 merits-based requests for production, 120

[3] An order allowing broad discovery without a threshold ruling on immunity is "immediately appealable as a denial of the true measure of protection" of immunity. *See Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 (5th Cir. 1995). Although *Wicks* is a qualified immunity case, the same logic holds for sovereign immunity. *See, e.g.*, *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011) ("The district court's discovery order effectively rejected Iran's claim of sovereign immunity and is therefore immediately appealable under the collateral-order doctrine.").

interrogatories, and 100 requests for admission, *none* of which broached the topic of immunity. *See Lewis v. Hughs*, No. 20-50654, Doc. 00515542111, at 660-980. Most egregiously, the Secretary then continued to engage in robust merits-based discovery for nearly two weeks after her motion to dismiss was denied, before filing her notice of appeal. In fact, the Secretary completed nearly all of her announced merits-based discovery *before* filing her notice of appeal.[4]

As in *Neinast*, the Secretary should not be permitted to use the judicial processes to test the merits of the case while awaiting (and, indeed, even after) the district court's ruling on immunity. 217 F.3d at 279. That she raised the immunity issue before digging in on the merits is irrelevant; it is the digging in that constitutes waiver because it is "conduct that is incompatible with an intent to preserve" immunity. *Kermode v. Univ. of Miss. Med. Ctr.*, 496 F. App'x 483, 489 (5th Cir. 2012) (quotation mark omitted).

II. The Secretary has a sufficient connection to the Challenged Provisions to satisfy *Ex parte Young*.

Even if the Secretary had not waived her immunity defense, the Court should affirm. The district court correctly concluded that sovereign

[4] As noted above, by the time the Secretary finally noticed her notice of appeal, her counsel had deposed all but five of the 18 people they had noticed—one of whom was not available, and another who was too ill to be deposed. The Secretary's remaining three depositions were to be of Appellees' experts, and her counsel specifically requested that they not take place until after the later deadline for expert rebuttal reports.

immunity does not bar Appellees' suit against the Secretary because the *Ex parte Young* exception applies here. That exception allows actions against state officials whenever a "state official, by virtue of his office," has a "sufficient connection to enforcing an allegedly unconstitutional law." *TDP*, 978 F.3d at 179 (quotation marks omitted).

Much ink has been spilled over what is a "sufficient connection," and hard cases may lie at the concept's outer boundaries. This is not one of those hard cases. Under *any* analysis, the Secretary has a "sufficient connection" to the Challenged Provisions at issue here. At times, this Court has considered whether a defendant must be "threatening to exercise" their authority, which has been phrased alternatively as showing a "demonstrated willingness to exercise" that authority.[5] *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019), *cert. denied sub nom. Austin, TX v. Paxton*, No. 19-1441, 2021 WL 78079 (U.S. Jan. 11, 2021) (noting the 'threatening to exercise' standard is the "same" as the 'demonstrated willingness to exercise' standard). Even though this Court has never conclusively decided that either are required, the Secretary's actions meet those tests. *See, e.g.*, *id.* at 1000 ("[W]e need not define the outer bounds of this circuit's *Ex parte Young* analysis today."); *Air Evac*,

[5] The 'demonstrated willingness' language traces its roots to the non-binding plurality decision in *Okpalobi v. Foster*, and no further. 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality op.). *Okpalobi*'s "Eleventh Amendment analysis is not binding." *K.P.*, 627 F.3d at 124.

851 F.3d at 519 ("The parties debate whether *Ex parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law. We need not resolve that question."); *infra* note 6.

Even if the Secretary's actions do not demonstrate a willingness to exercise her authority, she meets the minimum requirement of having either "some connection with the enforcement of the act in question or be[ing] specially charged with the duty to enforce the statute." *Daves v. Dallas Cnty., Tex.*, 984 F.3d 381, 400 (5th Cir. 2020) (internal quotes omitted). Either is sufficient. *See, e.g.*, *id.*

"In sum, [this Court's] precedents show, on one end of the spectrum, that a concrete statutory duty to enforce the challenged law will invoke the *Ex parte Young* exception to sovereign immunity. On the other end, the *Ex parte Young* exception does not apply to a defendant who has neither 'some connection' nor a 'special relationship' to the enforcement of the challenged law." *Daves*, 984 F.3d at 400. The Secretary's connection to the Challenged Provisions satisfies *Ex parte Young* at all points on this spectrum.

A. The Secretary has demonstrated her willingness to exercise her authority over the Challenged Provisions.

The Secretary's argument that Appellees must show that the Secretary has threatened or demonstrated a willingness to exercise her enforcement authority over the Challenged Provisions is not well-

founded in law.[6] *See Air Evac EMS*, 851 F.3d at 519. Nevertheless, even if that were a requirement, Appellees have satisfied it here, where the Secretary's directives, publications, and ongoing efforts to obtain uniformity in how counties apply the Challenged Provisions fit this bill.

Receipt Deadline. The Secretary has demonstrated her willingness to direct counties on the timelines by which they should count mail ballots, which informs the rationale for Appellees' argument that the current Receipt Deadline presents an unconstitutional burden on voters' rights: because counties do not need to count mail ballots on the current deadline for receiving them, there is no reason why mail ballots postmarked by election day must be received by the Receipt Deadline.

[6] Although this Court's recent decisions in *Daves* and *TDP* could be read to suggest that the Secretary must have shown "a demonstrated willingness to exercise" her duty to enforce the statutes in question, the basis for such a reading of those cases is unclear. *Daves*, 84 F.3d at 400; *TDP*, 978 F.3d at 179. Both cases cite to the 2014 decision in *Morris v. Livingston* for that proposition. 739 F.3d 740, 746 (5th Cir. 2014). (On this point, *Morris* quoted the non-binding plurality decision in *Okpalobi*, 244 F.3d at 416—as noted above, the "demonstrated willingness" language traces its roots to *Okpalobi's* non-binding plurality, and no further). But after *Morris*, in 2017, this Court stated in *Air Evac* that the Court "need not resolve"—and thus, had not resolved—"whether *Ex parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law." *Air Evac*, 851 F.3d at 519; *cf. City of Austin*, 943 F.3d at 999 (noting that the 'threatening to exercise' standard is the "same" as the 'demonstrated willingness to exercise' standard). Neither *Daves* nor *TDP* purport to resolve the question left open in *Air Evac*, nor does it appear that any other decision of this Court has.

ROA.44. Tex. Elec. Code § 86.007 requires domestic mail ballots to be postmarked by election day and received by the county the day after the election. In contrast, overseas mail-in ballots and military mail-in ballots need not be received until five days and six days after election day, respectively. *Id.* §§ 86.007, 101.057. In response to refinements to these deadlines under two 2017 laws, the Secretary's office directed county officials not to count domestic ballots received after election day or ballots from overseas and military voters until six days after election day (when the Early Voting Ballot Board reconvenes). *See* ROA.495 (Genevieve Gill, Early Voting by Mail, Texas Sec'y of State - Elections Div. Law Seminar, Nov. 2018). This highlights the Secretary's authority and willingness to exercise that authority over the precise activity—ballot counting, and the timeline for it—that undergirds Appellees' Receipt Deadline claims.[7]

Signature Match Without Cure. In line with her duty under Section 31.003 to "prepare detailed and comprehensive written directives and instructions relating to and based on this code," the Secretary publishes an Early Voting Ballot Board & Signature Verification Committee Handbook for Election Judges and Clerks. ROA.31, 506-55.

[7] Presumably this is why, when writing to alert Texans that "certain state-law requirements and deadlines appear to be incompatible with [USPS's] delivery standards," the USPS General Counsel addressed his warning to the Secretary, not county officials from all 254 counties. *See Texas League of United Latin Am. Citizens v. Abbott*, No. 1:20-CV-1006-RP, 2020 WL 5995969, at *4 (W.D. Tex. Oct. 9, 2020).

As a "directive" pursuant to Section 31.003, that handbook is necessarily an exercise of the Secretary's duty to obtain and maintain uniformity in how the challenged signature matching provisions at Section 87.027 are applied, and demonstrates her willingness to do so. *See* ROA.513-14, 546 (requiring Signature Verification Committee members to "use their best judgment"—a standard not found in the Texas Election Code—and "decide by a majority vote that the signatures are of the same person, or not of the same person").

Ballot Return Assistance Ban. The Secretary has demonstrated her willingness to enforce the Ballot Return Assistance Ban at Tex. Elec. Code § 86.006 by constraining from whom and when early voting clerks accept hand-delivered mail ballots. The Secretary does this by publishing a form that requires clerks to verify the identity of and record who hand-delivers a mail ballot before accepting it. The form emphasizes that "[a] voter may only deliver his or her own personal ballot," and if a "voter insists on leaving the Carrier Envelope without presenting an approved form of ID" to verify that she is the one delivering it, "the ballot will be treated as a ballot not timely returned and therefore, not counted."[8]

[8] Under Fed. R. Evid. 201(b)(2), this Court can take judicial notice of information from authoritative sources whose accuracy "cannot reasonably be questioned," including the Secretary of State's website. *See, e.g.*, *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015); *Cantwell v. Sterling*, 788 F.3d 507, 509 (5th Cir. 2015); *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

Signature Roster for Hand-Delivery of Ballot by Mail, https://www.sos.state.tx.us/elections/forms/pol-sub/november-3-2020-signature-roster-hand-delivery-carrier-envelope.pdf (last visited Feb. 9, 2021). The form states clearly that it is "[p]rescribed by the Secretary of State." *Id.* Much like the mail ballot application form at issue in *TDP*—which the Secretary designed and county officials send out and review upon receipt—this form is designed by the Secretary and utilized by early voting clerks, and is thus an active exercise of her authority to enforce the Ballot Return Assistance Ban. 978 F.3d at 180.

Also, under her authority at Tex. Elec. Code § 31.006, the Secretary collects, reviews, and elevates to the Attorney General complaints lodged with her alleging that a criminal violation of the Code has occurred, including § 86.006 (criminalizing assistance to voters in returning mail ballots), which this suit challenges. *See* Election Complaint Form, https://www.sos.state.tx.us/elections/forms/complaintform-sos.pdf, at 6 (last visited Feb. 9, 2021); ROA.18. As the Secretary's complaint form confirms, she has the authority to "refer elections complaints" to the Attorney General when she "determines that there is reasonable cause to suspect that the alleged criminal conduct occurred."[9] ROA.18. This

[9] It would be disingenuous to suggest otherwise as the constitutionality of Tex. Elec. Code § 273.021(a) is an open question. *See State v. Stephens*, 608 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2020, pet. pending). Indeed, the Attorney General initiated a prosecution over these very provisions just last month. *See* Press Release of Attorney General Paxton,

form thus also demonstrates the Secretary's willingness to exercise her authority to enforce the Ballot Return Assistance Ban.

Postage Tax. The Secretary collects, reviews, and grants voters' requests for postage-paid voter registration forms, which shows her ability to circumscribe election postage issues. *See* Request for Postage-Paid Voter Registration Form, https://webservices.sos.state.tx.us/vrrequest/index.asp (last visited Feb. 9, 2021). Although county officials prepare mail ballot envelopes, the Secretary governs what is required to be inside the envelopes, which Appellees argue, on the merits, must include a return postage-paid mailer—which would be within the Secretary's authority to mandate.

Broad Exercise of Authority to Maintain Uniformity. More broadly, the Secretary has not hesitated to flex her authority under Sections 31.003 and .005 to "correct" conduct that is not uniform amongst counties and does not comport with her interpretation of how the Election Code should be applied. Her efforts to obtain and maintain uniformity are key to the analysis here because the Secretary's argument boils down to the following: for the kind of relief Appellees seek, they must sue individual counties. *See* Appellant's Br. at 19. But the practical and

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San Antonio Election Fraudster Arrested for Wide-spread Vote Harvesting and Fraud (Jan. 13, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-san-antonio-election-fraudster-arrested-widespread-vote-harvesting-and-fraud.

statutory implications of doing so are vexing. Under the Secretary's view, an unconstitutional Code provision can only be challenged by suing an individual county, even though that county has no "discretion" to disregard state law, and even though the foreseeable consequence of such a regime would be an erratic patchwork of enforcement where the law is challenged in some of Texas's 254 counties and left unchallenged in others.

Notably, during the pendency of this very appeal, the Secretary exercised her authority to maintain uniformity in how Texas's mail voting provisions are applied by directing the Attorney General to sue the Harris County Clerk for seeking to send vote by mail applications to every voter in the county under 65, despite the Secretary's contrary guidance based on her interpretation of the Texas Election Code. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *2 (Tex. Oct. 7, 2020). In doing so, the State affirmatively argued that county election officials "may not manage the vote-by-mail process as [they] see[] fit." Pet. for Review and Brief on the Merits, *State v. Hollins*, No. 20-0729, 2020 WL 5876836, at *3 (Tex. Sept. 22, 2020). The Secretary's actions in *State v. Hollins* starkly demonstrate her willingness to exercise her duty to obtain uniformity in the vote-by-mail process under the Code, which applies equally here. Ultimately, the Secretary's attempt to disclaim her broad enforcement power—which, as detailed *infra* Section II.B.1-2

below, supplies a sufficient connection here to warrant the *Ex parte Young* exception—does not withstand scrutiny.

B. The Secretary has both "some connection" to and is "specially charged" with enforcing the Challenged Provisions.

Even if the Secretary had not threatened or demonstrated a willingness to enforce the Challenged Provisions, her statutory duties to enforce them independently provide a sufficient connection under *Ex parte Young*. The Secretary has both "some connection" to and is "specially charged" with enforcing the Challenged Provisions based on the definition of enforcement as entailing "compulsion or constraint." *TDP*, 978 F.3d at 179 (quoting *K.P.*, 627 F.3d at 124). Under this Court's precedents, the relevant threshold is exceedingly minimal: as this Court reiterated just months ago, a mere "'scintilla of enforcement by the relevant state official with respect to the challenged law' will do." *Id.* (quoting *City of Austin*, 943 F.3d at 1002). More than sufficient connection is present here based on the Secretary's general duties under the Texas Election Code, which compel her to ensure that the Challenged Provisions are applied uniformly and consistently with her view of legal requirements, and give her the authority to constrain and override local officials' actions if they are not.

1. The Secretary has a duty to constrain counties in their application of the Challenged Provisions.

The Secretary's argument that her general duties under Sections 31.003 and .005 of the Texas Election Code do not provide a sufficient connection to the Challenged Provisions does not withstand scrutiny. Appellant's Br. at 16-19. Section 31.003 unequivocally states that the Secretary "*shall obtain and maintain uniformity* in the application, operation, and interpretation of" Texas's election laws—which of course include the Challenged Provisions—such as by "prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code . . . ." Tex. Elec. Code § 31.003 (emphasis added). This is much more than just a simple, "general duty to see that the laws of the state are implemented," as the Secretary suggests. Appellant's Br. at 13. It is a specific statutory mandate giving the Secretary the responsibility and authority to *ensure* uniform implementation of Texas's Election Code. *See Cascos v. Tarrant Cnty. Democratic Party*, 473 S.W.3d 780, 786 (Tex. 2015) (per curiam) (noting the Secretary is "responsible for ensuring the uniform application and interpretation of election laws throughout Texas."). The Code also requires her to "assist and advise all election authorities" in "the application, operation, and interpretation" of the Code. Tex. Elec. Code § 31.004.

Both Sections 31.003 and .004 feature the word "shall," which makes clear that the Secretary's duties are mandatory, *Valdez v.*

Cockrell, 274 F.3d 941, 950 (5th Cir. 2001), and comports with this Court's prior interpretation of them as "requiring the Secretary to take action with respect to elections." *Lightbourn*, 118 F.3d at 429. Under these provisions, the Secretary must and does constrain local election officials from applying interpretations of the Texas Election Code that differ from her own, part and parcel with her compulsion to enforce the Code uniformly. This is as true of the Challenged Provisions as anything else in Texas election law. For example, and as detailed more fully *supra* Section II.A, the Secretary has a duty to direct county election administrators to uniformly disregard ballots not received by the statutory deadline, even if postmarked by election day, and does not include those ballots in her statewide canvass. Local elections officials have *no* authority to accept ballots after that deadline. And the Secretary has a duty to uniformly preclude counties from counting ballots in the statewide canvass that have been flagged for rejection based on a perceived signature mismatch using no standard other than an entirely subjective "best judgment" assessment that she established and sets forth in her Signature Verification Committee Handbook for Election Judges and Clerks. ROA 546. The district court thus rightly rejected the Secretary's attempt to distance herself from her statutory connection to enforcement of the Challenged Provisions.

The district court also pointed to the Secretary's express power under Section 31.005(a)-(b) to "take appropriate action to protect" voting

rights "from abuse by the authorities administering the state's electoral processes," which includes "order[ing] the person to correct the offending conduct," and independently provides a sufficient connection under *Ex parte Young*. ROA.670-71 (quoting Tex. Elec. Code § 31.005). The Secretary's authority to issue orders to protect voting rights is accompanied by its own enforcement scheme: if an official "fails to comply, the secretary may seek enforcement . . . by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." ROA.670-71. Under this authority, if an elections official were to reject the Secretary's interpretation of how the Challenged Provisions should be uniformly applied, the Secretary has the explicit power to, through the Texas Attorney General, "bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws." *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012), *rev'd and remanded sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (reversed and remanded on other grounds). That is, indisputably, a form of enforcement that would on its own satisfy the *Ex parte Young* standard. Thus, the Secretary is not just the chief election officer tasked with maintaining uniformity of the laws—the law also *expressly authorizes* her to remedy the voting rights violations identified in Appellees' suit and to implement their requested relief. *See id.* Section 31.005 alone provides a sufficient connection under *Ex parte Young*.

Contrary to the Secretary's suggestion in her opening brief, this Court's case law does *not* provide that general duties like those in Sections 31.003-.005 are insufficient to warrant the *Ex parte Young* exception. "'The fact that the state officer, by virtue of his office, has some connection with the enforcement of the [challenged] act, is the important and material fact, and *whether it arises out of the general law*, or is specially created by the act itself, is not material so long as it exists.'" *K.P. v. LeBlanc*, 627 F.3d at 124 (quoting *Ex parte Young*, 209 U.S. at 157) (emphasis added). As *Ex parte Young* confirms, "being specially charged with the duty to enforce the [challenged] statute is sufficiently apparent when such duty exists under the *general authority* of some law, even though such authority is not to be found in the particular act." 209 U.S. 158 (emphasis added); *see also id.* at 157 ("It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced."); *City of Austin,* 943 F.3d at 997-98 ("The text of the challenged law need not actually state the official's duty to enforce it, although such a statement may make that duty clearer.").

This Court has not yet ruled on whether the Secretary's duties under Sections 31.003-.005 provide her with a sufficient connection to the enforcement of other Code provisions under *Ex parte Young*. No relevant cases discuss Section 31.005, which independently provides a sufficient connection under *Ex parte Young*. *TDP* is the only case to have cited Sections 31.003-.004 in the sovereign immunity context, but there, this

Court held that the Secretary's duties under other provisions of the Code were "enough for [the Court] to conclude that the Secretary has at least a scintilla of enforcement authority." *TDP*, 978 F.3d at 180. As a result, this Court "d[id] not need to consider" whether the Secretary's duties under Sections 31.003-.004 "might suffice" to apply the *Ex parte Young* exception. *Id.* They do as to the Challenged Provisions, as confirmed above.

2. The distribution of duties related to the Challenged Provisions does not negate the Secretary's connection to them.

The role of counties in the final mile of applying the Challenged Provisions does not sever the Secretary's statutory connection to their enforcement further up the pipeline. This Court has explained that the type of "direct enforcement found in *Ex parte Young* . . . is not required" because plaintiffs need only show that an official "effectively ensure[s] the [statutory] scheme is enforced" or engages in actions pursuant to the statute that constrain the plaintiffs. *Air Evac EMS*, 851 F.3d at 519; *see also K.P.*, 627 F.3d at 124-25 (holding a sufficient connection was present where a statute only "implicitly require[d]" the defendant to act, which this Court said constituted an "active role" in enforcing the statute). Thus, contrary to the Secretary's suggestion, Appellant's Br. at 13-15, it does not matter whether she *personally* distributes, collects, or processes mail ballots: it is sufficient that she is statutorily required to *direct* local

officials on the Challenged Provisions' interpretation and application, and ensure that they are universally and uniformly enforced to Appellees' detriment.

The Secretary is wrong to suggest that the required "provision-by-provision" analysis "would be pointless if *Ex parte Young* were satisfied merely by the invocation of her title or general authority." Appellant's Br. at 16 (citing *TDP*, 978 F.3d at 179). Indeed, as *Ex parte Young* notes, "being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the *general authority* of some law, even though such authority is not to be found in the particular act [being challenged]. It might exist by reason of the *general duties* of the officer to enforce it as a law of the state." *Ex parte Young*, 209 U.S. at 158 (emphasis added). The point is simple. Sometimes, a particular statutory provision embodies the connection of a particular official to it. That can suffice for *Ex parte Young* purposes. Other times, an officer's connection to a specific statute is manifested through the officer's more overarching duties and responsibilities. That, too, can suffice. Here, Section 31.003 constrains how all of the Challenged Provisions can be applied by requiring that such be uniform across all of Texas's 254 counties, and thus satisfies *Ex parte Young*.

To provide one example as detailed more fully in *supra* Section II.A: county election officials are the ones who review a signature on the mail ballot envelope to determine if the signature "matches" the voter's

signature on file, but it is the Secretary who (pursuant to Section 31.003) promulgates the handbook that instructs county election officials on how to carry out that process according to their "best judgment," a subjective metric that she announced in her handbook and is nowhere to be found in the governing statutes. *See* ROA.45-46, 544, 546 (Signature Verification Committee Handbook for Election Judges and Clerks). As this example demonstrates—and as the State of Texas has pointed out to the Texas Supreme Court—although courts "must consider the specific statutory language at issue, [they] must do so while looking to the statute as a whole, rather than as 'isolated provisions.'" *In re State*, 602 S.W.3d 549, 559 n.56 (Tex. 2020) (quoting *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014)).

This principle—the "whole-text canon"—"calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012); *see also Hewitt v. Helix Energy Sols. Grp., Inc.*, 983 F.3d 789, 799 (5th Cir. 2020) (Ho, J., concurring) (noting "it is a bedrock principle of statutory interpretation that 'text[s] must be construed as a whole'" and "'[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon'") (quoting Scalia & Garner, *Reading Law*, at 167); *Matter of Lopez*, 867 F.3d 663, 670 n.5 (5th Cir. 2018) (quoting whole-text canon from Scalia & Garner). Courts "must look to the particular statutory

language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Doing so here confirms the importance of Sections 31.003-.004 to the Challenged Provisions, and vice versa.

Problematically for the Secretary, Sections 31.003-.005 would have no meaning if they existed in a vacuum, without regard to or effect on the operation of other provisions of the Code, like the Challenged Provisions. *See* Scalia & Garner, *Reading Law* at 174 (describing the surplusage canon, under which every provision should be given effect, and none should be interpreted as having no consequence). In particular, Section 31.003's mandate that the Secretary "obtain and maintain uniformity" in how the Code is applied only has meaning when viewed through the lens of other provisions where actions actually take place; that is, provisions that describe actions which could be applied in non-conforming or idiosyncratic ways, like the Challenged Provisions. Likewise, Section 31.004's procedural requirement that the Secretary "assist and advise all election authorities with regard to the application, operation, and interpretation of this code" would be meaningless in the absence of substantive sections to which that procedure applies. And Section 31.005's express empowerment of the Secretary to take legal action to compel other election officials to adhere to her interpretation of provisions addressing voting rights threatened in "any part of the

electoral process" would be hollow without looking to those parts, which again necessarily include the Challenged Provisions.

That is, the whole point of Sections 31.003-.005 is to empower the Secretary to guide, constrain, and if necessary, overrule *other* election officials' application of Texas election law—indeed, they would make little sense if they only covered provisions that the Secretary applies directly. To wit: Section 31.003 requires the Secretary to ensure that all *others* who implement various sections of the Code—including the Challenged Provisions—are uniform in how *they* apply them. Surely Section 31.004 does not require the Secretary to provide assistance and advice to herself, nor does Section 31.005 require her to take action against her own abuses. Neither the Secretary (nor anyone else for that matter) carries out the administration of an election alone. There are many other players involved, including signature reviewers employed by counties, and county officials who coordinate the distribution, collection, and processing of mail ballots, among others. But the Secretary is the captain of the team, even if others sometimes run the plays.

The Secretary tries to obscure her enforcement authority over the Challenged Provisions by citing *City of Austin* for the proposition that, "[w]here a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [this Court's] *Young* analysis ends." 943 F.3d at 998; Appellant's Br. at 13, 15-16. But *City of Austin* does not preclude, decide, or even address *multiple*

state actors from having roles in the enforcement of a challenged law and being properly subject to suit, as is the case for the Challenged Provisions. Indeed, this Court's recent decision in *TDP* confirms this, as discussed in the next section.

3. The Secretary misreads this Court's recent decisions in *TDP* and *Mi Familia Vota*.

The Secretary claims that her general duties under Tex. Elec. Code § 31.003 do not sufficiently connect her to the Challenged Provisions, but that argument is based on a misreading of this Court's recent decisions in *TDP* and *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020). Appellant's Br. at 16-19. *TDP* and *Mi Familia Vota* only held that the general moniker of "chief election officer" under Section 31.001 does not in-and-of-itself confer a sufficient connection to the provisions challenged in those suits. But neither decision grappled with whether a sufficient connection can be born from Section 31.003—nor has any other decision of this Court. Tellingly, the Secretary's brief barely does, either.

The portion of *TDP* that the Secretary relies on refers to the *Attorney General's* general duty to enforce and uphold the laws of Texas, not the Secretary's specific duty under Section 31.003 to ensure that the Election Code is applied uniformly. Appellant's Br. at 17 (citing *TDP,* 978 F.3d at 180). Far from holding that those powers do not sufficiently connect her to the provisions at issue in *TDP* for the purposes of *Ex parte Young*, this Court held that it need not even address Sections 31.003-.004

because her duties under other provisions at issue in *TDP* were *sufficient* to determine that sovereign immunity did *not* bar the suit. *TDP*, 978 F.3d at 180. The Secretary's specific duties under Sections 31.003-.004 stand in stark contrast to the Attorney General's non-binding view of the law divorced from any specific statutory authority to "obtain and maintain" the uniform action of county elections officials based on her interpretation of the law.

Stripped to its essence, the Secretary's position is that she lacks sufficient connection to the Challenged Provisions because she does not distribute, collect, and process mail ballots. But this misapplies the *Ex parte Young* doctrine and again ignores binding precedent. *TDP* rejected a nearly identical argument when considering the constitutionality of a state statute requiring voters under 65 to prove a disability to vote by mail. 978 F.3d at 180. This Court acknowledged that although "some duties fall on other officials," the Secretary was not immune from suit. *Id.* (citing Tex. Elec. Code § 86.001(a)). For example, while the Secretary designs the mail ballot application, local early voting clerks are the ones who mail and review each application. 978 F.3d at 180 (citing Tex. Elec. Code § 86.001(a)-(b)). *TDP* held that, "[t]hough there is a division of responsibilities, the Secretary has the needed connection" to the acceptance and rejection of mail ballot applications. *TDP*, 978 F.3d at 180. So too here where both the Secretary and county officials have roles

to play in enforcing the Challenged Provisions uniformly across Texas. *See supra* Section II.A.

The Secretary also relies on *Mi Familia Vota* to suggest that she lacks the requisite connection because counties, not her, distribute, collect, and process mail-in ballots, Br. at 19, but that reliance is similarly misplaced. The plaintiffs in *Mi Familia Vota* challenged a law that mandated the use of electronic voting machines for counties that *opted into* the Countywide Polling Place Program, and requested an injunction against the Secretary ordering that paper ballots be made available for those counties. 977 F.3d at 468. Critical to the Court's conclusion that the Secretary did not have a sufficient enforcement connection to those county's decisions to offer paper ballots was both the fact that participation in the program itself was optional, as clearly contemplated by the plain language of the law, and that it was silent as to whether paper ballots were required, thereby leaving that question to the counties' discretion. As such, the relief requested—making paper ballots available—did not invoke any provision that the Secretary was required to ensure was uniformly applied. The same cannot be said of the Challenged Provisions. Counties do not, for example, have the discretion to accept ballots that arrive after the Receipt Deadline, or to choose not to engage in signature matching at all (no matter how unreliable the process has proven to be).

While the Secretary's argument hinges on a misreading of recent precedent, the Secretary ignores that, for decades, this Circuit has permitted similar suits against her predecessors in challenges to a wide variety of Texas election laws. *See, e.g., Voting for Am., Inc.*, 732 F.3d at 382 (concerning volunteer deputy registrars); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006) (concerning whether party officer can declare candidate ineligible); *Tex. Indep. Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996) (concerning declaration of intent to run for office). In fact, the U.S. Supreme Court affirmed a decision in the Eastern District of Texas nearly fifty years ago, in which that court found that the Secretary is "responsible for the enforcement of the Texas election laws." *Tolpo v Bullock*, 356 F. Supp. 712, 713 (E.D. Tex. 1972). And district courts in this Circuit have repeatedly and uniformly followed the Circuit's and the Court's lead in confirming and affirming the Secretary's role in enforcing Texas's elections laws. *See, e.g.*, *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020) (rejecting the same sovereign immunity argument raised here); *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 853 (W.D. Tex. 2020) (similar); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 832 (M.D. La. 2013) (similar). To accept the Secretary's invitation to overturn this unbroken and long-standing line of cases would result in an unwarranted sea change of the law established in case after case in this Circuit and wreak havoc on lower courts grappling with election law cases in Texas.

C. This Court's standing jurisprudence bolsters the conclusion that the Secretary has a sufficient connection to the Challenged Provisions.

This Court's standing jurisprudence also bolsters the conclusion that the Secretary has a sufficient connection to the Challenged Provisions under *Ex parte Young*.[10] In *OCA-Greater Houston*, this Court unequivocally held that the Secretary was the proper defendant in a challenge to a Texas election law under Article III, as the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)).[11] The Secretary recognizes that *OCA-Greater Houston*

[10] Notably, although the Secretary challenged Appellees' standing in her motion to dismiss, ROA.672-76, she has not sought leave to appeal the district court's denial of her claim that Appellees lack standing.

[11] Contrary to the Secretary's assertion, *OCA-Greater Houston* is not the subject of a circuit split. Appellant's Br. at 21 n.2. In *Jacobson v. Fla Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), the Eleventh Circuit determined that the Florida Secretary of State was not the proper defendant in a challenge to an election law concerning the order of candidates on ballots, given the division of responsibilities between elections officials and the Secretary under Florida law. Notably, the Florida and Texas Secretaries of State have different roles and responsibilities within their state's election schemes. The Secretary offers no analysis of how her statutory role in Texas elections is similar to that of the Florida Secretary of State. As a result, the Eleventh Circuit's analysis of the Florida Secretary of State's role in Florida's election scheme does not (and, as a matter of logic, cannot) create a split with this Court's analysis of the Texas Secretary of State's role in an entirely different election scheme.

is a particularly difficult precedent for her and accordingly seeks to confine its holding to the realm of standing, *see* Appellant's Br. at 20-21, but the precedents of this Court and those of at least four sister circuits do not support her. This Court has repeatedly held that the inquiries under Article III standing and the "connection" inquiry of *Ex parte Young* are almost identical, and that "it may be the case that an official's 'connection to [ ] enforcement' is satisfied when standing has been established." *City of Austin*, 943 F.3d at 1002; *see also Air Evac EMS, Inc.*, 851 F.3d at 520 (noting the "significant overlap" between the requirements of Article III and Ex Parte Young); *NiGen Biotech LLC v Paxton*, 804 F.3d 389, 395 n.5 (5th Cir. 2015) (describing inquiries under both questions as similar).

So too in the Sixth, Eighth, Ninth, and Tenth circuits. *See, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) ("[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy [the connection to the enforcement] element of *Ex parte Young*."); *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015) (noting the court's previous findings that a sufficient connection for *Ex parte Young* purposes met the Article III standing requirement and assuming the inquiries are equivalent); *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (explaining the "common thread" between Article III standing

analysis and *Ex parte Young* analysis); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (same).

Given this Court's holding that the Secretary is the proper official for a challenge to a Texas election statute under Article III due to her role and responsibilities concerning Texas elections, it would make little sense to hold that she does not similarly have a sufficient connection to enforcement under *Ex parte Young*.

III. The relief sought is permitted under *Ex parte Young*.

Finally, Appellees' requested relief falls within the scope of remedies permitted by *Ex parte Young*. First, the Secretary is wrong that the discretion she has as to how to enforce her mandatory duties under Sections 31.003-.004 bars the relief requested here. And second, her argument that a prohibitory injunction or declaratory judgment would not provide relief because they supposedly would not extend to local officials is both wrong on the law and outside the scope of this appeal.[12]

[12] In addition to the Secretary's arguments addressed above, the Secretary notes that the relief sought must be prospective and asserts that "Plaintiffs cannot clear [this] hurdle[]," Appellant's Br. at 24; *see also id.* at 30, but she does not advance any argument as to why Appellees' requested relief is not prospective. Appellees therefore need not address this issue. *See, e.g.*, *Indian Harbor Ins. Co. v. Bestcomp, Inc.*, 452 F. App'x 560, 565 (5th Cir. 2011) ("Because this argument is presented in a conclusory fashion, we will not consider it."); *United States v. Stalnaker*, 571 F.3d 428, 440-41 (5th Cir. 2009) (concluding that undeveloped arguments that lacked citations to relevant law were waived for inadequate briefing). As the district court correctly ruled, the relief requested is prospective. ROA.672.

A. The Secretary's discretion as to how she enforces the Texas Election Code does not bar the relief requested.

The Secretary argues that the requested relief is improper because—in her estimation—it requires the district court to order her to perform discretionary affirmative acts. Appellant's Br. at 25. This is wrong as a matter of both fact and law. Critically, the Secretary conflates her nondiscretionary statutory duties *to* act under Sections 31.003-.004 with her discretionary authority to decide *how* to act. Appellees' requested relief only concerns the former and thus is appropriate under *Ex parte Young*.[13] *See Lightbourn*, 118 F.3d at 429 (recognizing that Sections 31.003-.004 "requir[e] the Secretary to take action with respect to elections").

First, the Secretary is wrong on the facts of what Appellees' requested relief actually seeks: it would not dictate how she implements any discretionary duty. Rather, Appellees' requested relief would only require the Secretary to (a) cease enforcing the Challenged Provisions; (b) ensure that ballot envelopes have prepaid postage, and (c) put into the policies and procedures a requirement that voters have an "opportunity to cure any issues with signature verification before their ballots are rejected." ROA.55-56.

[13] Although Section 31.005 does entail some discretion, the Secretary's duties under Sections 31.003-.004 are sufficient to satisfy the *Ex parte Young* inquiry here, as detailed *supra* Section II.B.1-2.

This stands in contrast to the relief ordered in *Richardson v. Tex. Sec'y of State*, on which the Secretary relies. Appellant's Br. at 27 (citing 978 F.3d 220, 241 (5th Cir. 2020)). In *Richardson*, the district court's order "prescribe[d] detailed and specific procedures that the Secretary" was required to include in an advisory. 978 F.3d at 242. In particular, the district court's order commanded the Secretary to issue an advisory notifying local election officials that either (a) "mail-in-ballots may not be rejected on the basis of a perceived signature mismatch," or (b) the Constitution "*requires*" that voters be mailed notice of a ballot slated to be rejected on signature match grounds "within one day" of local officials' rejection determination, and that for voters who provided their phone number on their ballot application, "local election officials must make *at least one* phone call to that number within one day" of their rejection determination, among other requirements, and provide details to the voter about how they "may seek relief." *Richardson v. Texas Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *38 (W.D. Tex. Sept. 8, 2020). Option (b) also required the Secretary to advise local election officials that, for voters who notified local election officials that their ballot was "improperly rejected based on a perceived signature mismatch or claims that he or she signed both the application and the carrier envelope," the "appropriate county election officer *must* pursue a challenge on behalf of the voter" pursuant to the statute that allows them to petition a district court for injunctive relief if they determine that a

ballot was incorrectly rejected, "*unless* the voter *explicitly* informs the county election officer that he or she does not wish for the official to pursue relief on the voter's behalf." *Id.* (citing Tex. Elec. Code § 87.127).

Appellees' requested relief comes nowhere near this. Again, Appellees only seek an order precluding the Secretary from enforcing the Challenged Provisions and ensuring that those provisions are instead implemented in a constitutional fashion. ROA.55-56. Critically, Appellees did not and do not ask the Court to wade into the details, such as *how* to design a specific notice and signature cure system, *when* such notice must be provided, or *who* should pay for postage and how (whether the Secretary, counties, or any other entity).[14] The mere fact that a cure opportunity and plan to pay for postage would need to be designed and created (not by the court) if the requested relief were granted hardly constitutes impermissible affirmative action. *See Vann v. Kempthorne*, 534 F.3d 741, 754 (D.C. Cir. 2008) ("The Cherokee Nation complains that the requested relief will require amendments to the tribe's constitution . . . . That the tribe might ultimately amend its constitution

[14] The relief requested is to "[p]reliminarily and permanently enjoin Defendant, and her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, requiring them to provide prepaid postage on the ballot carrier envelopes used to return the marked mail-in ballots to the counties." ROA.55. Because the relief encompasses "all persons acting in concert" with the Secretary (which could include county election officials), it does not necessarily suggest that she should provide prepaid postage, or dictate that any other specific actor must do so.

to bring its elections into conformance with federal law is irrelevant to our sovereign immunity analysis, because any such change would not be the direct result of judicial compulsion."). Thus, Appellees' requested relief does not impermissibly circumscribe how the Secretary should go about obtaining and maintaining uniformity under Section 31.003. All that the requested relief concerns is the Secretary's nondiscretionary statutory mandate to ensure such uniformity—consistent with the federal constitution—writ large.

Second, as a matter of law, the Secretary's assertion that mandatory injunctions are clearly prohibited under *Ex parte Young* is incorrect. Indeed, a panel of this Court noted last year that this precise issue "is an unsettled question that has roused significant debate." *Richardson*, 978 F.3d at 241 (quoting *Green Valley v. Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 n.21 (5th Cir. 2020)). The source of the question is a footnote in *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 691 n.11 (1949). *Larson* considered an injunction to *prohibit* an agency from entering into a contract based on sovereign immunity, yet in a footnote said that "a suit may fail . . . if the relief requested . . . will require affirmative action by the sovereign. . . ." *Id.* That comment is classic dicta, not essential to the resolution of that case about *prohibiting* certain action. *See Vann*, 534 F.3d at 752 (*Larson* footnote 11 is dicta). *Vann*—which *Green Valley* cites—concluded that to credit the position that *Larson*'s footnote 11 prohibits all mandatory injunctions "would be

to conclude that *Larson* overruled *Ex parte Young* in dicta, in a footnote, without even citing the case." 534 F.3d at 754.

The Secretary points to *Danos v. Jones* to suggest that *Larson's* footnote 11 governs affirmative injunctions in this circuit, Appellant's Br. at 26, but *Danos* suggests nothing of the sort. 652 F.3d 577 (5th Cir. 2011). *Danos* only cited *Larson* as part of its analysis that a "suit is one against the United States where the remedy sought is back pay which can be satisfied only out of the public treasury." *Id.* at 583 (quotation marks omitted). *Danos* did not consider any *injunctive* relief, as is at issue here. *Id.* at 583 (noting that the plaintiff's "claim for injunctive relief is moot"). Thus, the Secretary's invocation of the rule of orderliness is inapplicable here. *See* Appellant's Br. at 26.

It is worth emphasizing that authority from both this Court and the Supreme Court make clear that *Ex parte Young* permits injunctions that direct "officials to conform their future conduct to the requirements of federal law." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)). It is on this basis that both this Court and the Supreme Court have placed affirmative obligations on state officials to remedy ongoing constitutional harms under *Ex parte Young*. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (rejecting assertion of sovereign immunity concerning requirement that state pay for future educational components of relief to remedy harms caused by state's constitutional violations); *Thomas ex rel.*

D.M.T. v. Sch. Bd. St. Martin Parish, 756 F.3d 380, 387-88 (5th Cir. 2014) (noting school board "remained subject to affirmative obligations" by permanent injunction issued by court in 1974 to remedy constitutional harms). The district court was thus correct to conclude that Appellees' requested relief is permissible.

B. A prohibitory injunction or declaratory judgment against the Secretary would provide relief.

The Secretary's final argument—that the relief Appellees seek would be ineffective because it supposedly does not extend to local officials—is both wrong on the law and outside the scope of this appeal. The Secretary overlooks the fact that Fed. R. Civ. P. 65(d)(2)(C) provides that an injunction can bind "other persons who are in active concert or participation" with the parties and their "officers, agents, servants, employees, and attorneys." Suing or joining officials from all 254 of Texas's counties is not only unnecessary, it is impractical and would be a recipe for unmanageable proceedings. Moreover, it would be a grossly inconvenient and needless burden on county officials hauled into court far from their local jurisdictions any time the state passes an election statute that is unconstitutional on a facial or as applied basis.

The Secretary never explains how her concern that Appellees' requested relief will not provide the remedy they seek—because it would bind her, and not (in her telling) local election officials—is relevant to the *Ex parte Young* analysis, or how it otherwise relates to the sovereign

immunity inquiry before this Court. Instead, it appears to be an attempt to improperly expand the scope of this appeal to also reach the district court's denial of the Secretary's arguments that Appellees lacked standing to proceed in this case. But unlike sovereign immunity, the Secretary cannot immediately appeal the district court's ruling on standing as of right, nor has the Secretary even sought leave to file an interlocutory appeal on that question. *See* 28 U.S.C. § 1292(b); *Catlin v. United States*, 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."). In any event, it is also wrong as a matter of law. Appellees do not need to demonstrate that the relief sought will "completely cure the injury . . . it's enough if the desired relief would lessen it." *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). That is indeed so here.

Finally, the Secretary's argument that "a declaration as to the constitutionality of the challenged Election Code provisions would bind the Secretary but not the local officials who implement and enforce them" is simply wrong. Appellant's Br. at 30; *see also id.* at 28-29. If the Court declares the Challenged Provisions to be unconstitutional as a matter of law, then *no entity* is entitled to enforce them. This Court's opinion in *Mi Familia Vota*, on which the Secretary relies, does not hold otherwise. 977 F.3d 461. There, the plaintiffs challenged the Secretary's enforcement of an "electronic-voting-devices-only" requirement in a program into which

counties could opt to participate. *Id.* at 468. This requirement limited counties in the program to using electronic voting devices and prohibited the use of paper ballots. The plaintiffs sought to require all counties to offer an option to vote with paper ballots, but the Court concluded that relief would not follow from enjoining the Secretary's enforcement of the electronic device provision because counties would still have the discretion to choose between using electronic devices or paper ballots, *regardless of* the injunction. *See id.*

This case is not analogous. If, for example, the Receipt Deadline violates federal law—and it does—then ballots postmarked by election day but received after it until the vote is canvassed should be counted, which they otherwise would not be in absence of the requested relief. Likewise, if the Signature Match Without Cure provision is unconstitutional, then mail ballots should not be rejected based on an erroneous determination that the signatures do not match according to a reviewer's subjective "best judgment," or for containing a mismatched signature without giving a voter an adequate chance to cure the issue—again, something that would not happen without the requested relief. So too for the Ballot Return Assistance Ban: if unconstitutional, then signed mail ballots (with matching signatures) physically returned by individuals other than the voter herself should be counted and not treated as a ballot not timely returned and therefore, not counted, and individuals who possess a signed mail ballot cast by a voter who they are

not closely related to or living with should not face criminal prosecution as referred to the Attorney General by the Secretary—which similarly would be prohibited in the absence of the proposed injunction. And finally, if mail ballots without return postage provided are unconstitutional as applied to certain categories of voters, then the Secretary would need to ensure that none are provided to voters without proper postage—an action which she appears not to be taking without being forced to do so. In sum, Appellees' requested relief is both permissible under *Ex parte Young* and an effective remedy against the unconstitutional nature of the Challenged Provisions.

CONCLUSION

The structure of the Texas Election Code, federal court precedent, and the Secretary's own election resources foreclose the argument that she does not have a "scintilla" of connection to the enforcement of the Challenged Provisions. Because she does, and because the relief Appellees request is proper under *Ex parte Young*, that exception applies and the district court's sound denial of the Secretary's motion to dismiss should be affirmed.

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CERTIFICATE OF SERVICE

On February 10, 2021 this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) no privacy redactions were required under Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 12,335 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type-style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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